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No. 85-2153

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

v.

BOSTON AND MAINE CORPORATION,
Respondent.

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED

Section 10505 of the Interstate Commerce Act permits, under certain circumstances, the Interstate Commerce Commission ("ICC") to exempt transactions from regulation. The statute further requires that the ICC impose labor protection provisions to protect workers from adverse impacts caused by the implementation of such transactions and to provide a specialized dispute resolution procedure. The ICC exempted the present transaction and imposed labor protection provisions. The Petitioner brought suit to impose the Railway Labor Act dispute resolution procedures to deal with the adverse impact of the exempted transaction.

The questions presented are:

(1) Did the Court of Appeals err in analyzing the disputes arising out of adverse impacts on employees as disputes which were subject to resolution under the Railway Labor Act, 45 U.S.C. §§151 *et seq.* rather than as disputes subject to resolution exclusively under the procedure set forth in the *Mendocino Coast* Labor Protection Provisions imposed by the Interstate Commerce Commission?

(2) Did the Petitioner's attempt to utilize the dispute resolution provisions of the Railway Labor Act constitute a collateral attack upon an Order of the ICC over which the District Court had no subject matter jurisdiction pursuant to 28 U.S.C. §2321?

(3) Assuming that the dispute resolution procedures under the Railway Labor Act could be properly invoked, did the Court of Appeals err in holding that Petitioner's challenges of the Respondent's prior lease transactions precluded reliance on those transactions

as instances of custom and practice to prove the instant disputes were minor?

LIST OF PARTIES

The parties to the proceedings below were the Cross Petitioner/Respondent, Boston and Maine Corporation and Petitioner, the Brotherhood of Locomotive Engineers.

The following is a list of all parent, subsidiary and affiliate corporations of Boston and Maine Corporation as required by Rule 28.1 of the Supreme Court Rules:

Guilford Transportation Industries, Inc.;
Guilford Motor Express, Inc.;
Guilford Aviation Corporation;
Hudson River Estates, Inc.;
Railstar Control Technology, Inc.;

Boston and Maine Corporation;
Springfield Terminal Railway Company;
Cheshire Bridge Corporation;
The Mystic Terminal Company;
Stony Brook Railroad Corporation;
Northern Railroad;
Vermont and Massachusetts Railroad Company;
North Station Industrial Building, Inc.;
North Station Hotel Building, Inc.;
Pine Tree Corporation;
Connecticut River Valley Company, Inc.;

Delaware and Hudson Railway Company
Albany Port Railroad Corporation;
Napierville Junction Railway Co.;
Albany and Vermont Railroad Company;
Greenwich and Johnsonville Railway Company;
Wilkes-Barre Connecting Railroad Company;
Saratoga and Schenectady Railroad Company;
The Northern New York Development Company;
Wyoming Valley Improvement Company;

Maine Central Railroad Company; and
Portland Terminal Company.

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No. 85-2153

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
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v.

BOSTON AND MAINE CORPORATION,
Respondent.

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

The Cross-Petitioner, Boston and Maine Corporation, petitions this Court for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the First Circuit rendered on April 9, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, dated April 9, 1986, is reported at 788 F.2d 794 and is reproduced in Petitioner's Appendix at 1a-14a. The opinion of the United States District Court for the District of Massachusetts, dated October 4, 1985, has not been reported. It is reproduced in Petitioner's Appendix at 15a-19a. The decision of the Interstate Commerce Commission, dated April 26, 1985, is reproduced in Cross-Petitioner's Appendix at 1a.

JURISDICTION

Petitioner brought this suit in the District Court of Massachusetts seeking to invoke federal jurisdiction pursuant to 28 U.S.C. §§1131, 1137 and 2201. On October 4, 1985, the District Court dismissed the suit for want of subject matter jurisdiction.

On Petitioner's appeal, the First Circuit, on April 9, 1986, affirmed the District Court's dismissal. No petition for rehearing was sought. Petitioner filed a motion for a stay of mandate on April 21, 1986, which was denied on May 2, 1986.

Cross-Petitioner received a copy of the Petition for Writ of Certiorari on June 30, 1986. Pursuant to Rule 19.5 of the Supreme Court Rules, Cross-Petitioner, Boston and Maine Corporation, is timely filing a Cross-Petition for a Writ of Certiorari. The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this proceeding are 49 U.S.C. §§10505, 11341 and 11347 of the Interstate Commerce Act and 45 U.S.C. §§152, First and Seventh and 156 of the Railway Labor Act. The pertinent portions of these statutes are set forth in Petitioner's Appendix at 21a-25a.

STATEMENT OF THE CASE

Cross-Petitioner, Boston and Maine Corporation ("B&M") operates a railroad in the Northeastern United States. The present controversy centers around the lease of track by B&M to the New England Southern Railroad Co., Inc. ("NES").

A. Proceedings Before the ICC

In order to effectuate this transaction, B&M and NES filed, on January 29, 1985, a Joint Petition with the Interstate Commerce Commission (the "ICC") seeking exemptions of the lease under the Interstate Commerce Act ("ICA"), at 49 U.S.C. §10505. In order for the lease transaction to be exempted from regulation, the ICC is required to determine that: (1) regulation is not necessary to carry out federal rail transportation policy and (2) either (a) the matters are of limited scope or (b) regulation is not necessary to prevent abuses of market power. The ICC made favorable determinations on all these points and concluded that granting B&M and NES's Joint Petition would promote rail transportation policy:

> Granting the exemption will minimize regulation, expedite decisions where regulation is not necessary, and reduce regulatory barriers to entry. Further, there will not be any abuse of market power, since there will

> not be any change in the number of competitive alternatives available to shippers or any change in the quality of service. There will be only a substitution of one carrier for another, with the new carrier operating under the standards of the previous carrier. Finally, the proposal is of limited scope, involving only 27 miles of line, 27 customers, and 2,000 carloads of traffic per year.

ICC Decision, Cross-Petitioner's Appendix at 6a-7a.

In the Joint Petition, B&M and NES made clear that NES would be responsible for all train operations on the leased track. As the ICC noted in its Decision, the Brotherhood of Locomotive Engineers ("BLE"), the United Transportation Union[1] and the Railway Labor Executives' Association[2] all sought to have the ICC impose labor protection provisions to protect B&M employees adversely affected by the lease. Cross-Petitioner's Appendix at 3a-4a,7a.

In its Decision dated April 26, 1986, the ICC concluded that labor protection provisions ("LPP") should be imposed. In accordance with its long-standing policy in lease cases, the ICC imposed the LPP's as described in *Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad*, 360 I.C.C. 653 (1980), *aff'd. sub nom. Railway Labor Executives' Association v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

On July 14, 1985, the lease between B&M and NES was implemented at which time, *inter alia*, the Concord

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[1]The United Transportation Union ("UTU") is a union representing other employees of the B&M. The UTU is not involved in this action.

[2]The Railway Labor Executives' Association is an unincorporated, voluntary association of the chief executive officers of numerous labor organizations which collectively represent substantially all of this nation's railroad employees.

switcher assignment was abolished, the regularly assigned A and B unit coal train crew positions were abolished and the EDCO/COED (East Deerfield to Concord/Concord to East Deerfield) train was changed to EDMA/MAED (East Deerfield to Manchester/Manchester to East Deerfield).

B. Proceedings Below

In response to the implementation of this lease, the BLE, on July 18, 1985, filed with the District Court a Verified Complaint for Declaratory and Injunctive Relief, a Motion for Temporary Restraining Order and a Motion for Preliminary Injunction. On July 19, 1985, the Honorable Judge Mazzone, sitting as an Emergency Judge, denied the BLE's Motion for Temporary Restraining Order.

On August 1, 1985, the District Court, by the Honorable Judge Keeton, heard oral argument on the BLE's Motion for Preliminary Injunction. In this injunction action, the BLE was seeking to reverse the changes which had taken place as a result of the ICC exempted lease transaction. The BLE alleged that B&M had violated the Railway Labor Act ("RLA") by unilaterally changing the rates of pay, rules and working conditions of BLE members and, therefore, the BLE was entitled to a *status quo* injunction to enforce the obligations set forth in Section 6 of the RLA, 45 U.S.C. §156. B&M argued, *inter alia*, that the District Court did not have jurisdiction since the Complaint constituted a collateral attack on an Order of the ICC.

On October 4, 1985, the District Court dismissed the BLE's Complaint in its entirety for want of subject matter jurisdiction. The Court reasoned that it did not have jurisdiction to issue a preliminary injunction since the disputes presented were not "major" disputes under the RLA. In so

holding, the District Court did not adopt the reasoning urged by B&M. Rather, the Court held that the disputes were "minor" under the RLA and, therefore, that the proper forum for resolution was arbitration before the National Railroad Adjustment Board pursuant to 45 U.S.C. §154.

On appeal, the First Circuit affirmed the result of the District Court. The First Circuit held the Unit Coal Train controversy represented a "minor" dispute over which the District Court lacked jurisdiction. In regard to the abolishment of the Concord switcher and the change in the EDCO/COED train to EDMA/MAED, the Court held that these disputes were "major". The Court, however, affirmed the District Court's decision on the basis that the relief requested by the BLE was in essence a collateral attack on an ICC order over which a District Court does not have jurisdiction. The First Circuit did not apply this analysis, however, to the Unit Coal Train controversy.

REASONS FOR GRANTING THE CROSS-PETITION

I. THE COURT OF APPEALS' DECISION UNDERMINES NATIONAL TRANSPORTATION POLICY BY FAILING TO RECONCILE PROPERLY THE ICA AND THE RLA

The analysis performed by the Court of Appeals misconstrues the relationship between the ICA and the RLA and threatens to interfere seriously with, and delay, the ability of railroads to implement ICC-approved or exempted transactions. The Court of Appeals, in applying the "major" or "minor" dispute analysis of the RLA, further confuses and adds uncertainty in the rail industry over

the implementation of ICC-approved or exempted transactions.

A. The Disputes Involved Are Neither Major Nor Minor But Are Disputes Subject to Resolution Under Mendocino Coast

The categorization of disputes under the RLA as major or minor is a judicially-created approach used to determine whether the dispute is to be resolved, respectively, by negotiations and mediation in accordance with 45 U.S.C. §155 (National Mediation Board) or by arbitration in accordance with 45 U.S.C. §154 (National Railroad Adjustment Board). *E.g., Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 723 (1945). It has been acknowledged that not all disputes are necessarily major or minor. *E.g., Long Island Railroad Company v. Brotherhood of Locomotive Engineers*, 290 F.Supp. 100, 103 (E.D. N.Y. 1968); *See*, LUSTGARTEN, Principles of Railroad and Airline Labor Law (Rall Pub. 1984) at pp. 148-50. Presented before this Court are examples of disputes which are neither "major" nor "minor"; rather, they are disputes subject to resolution pursuant to *Mendocino Coast*.

It was clearly anticipated by Congress in enacting the LPP enabling legislation, ICA, 49 U.S.C. §11347, that employees would be adversely affected by ICC approved or exempted transactions and that amendments to labor agreements between carriers and labor organizations would be necessary in order to effectuate these transactions. The *Mendocino Coast* conditions require that a carrier give at least twenty days' notice to interested employees and their designated representatives setting forth the changes to be made, including an estimate of the number of employees expected to be displaced or dismissed as a

result of the lease. Either the carrier or the employee representative(s) may request negotiations for the purpose of arriving at an implementing agreement which typically will provide for LPP claims procedures and any special arrangements for affected employees, including, *e.g.*, changes in seniority districts or work assignments resulting from the transactions.

Additionally, the substantive benefits provided under *Mendocino Coast* are extensive. For example, dismissed employees receive an allowance of full wages and benefits for up to six years. Employees displaced to lower paying jobs receive a displacement allowance equal to the difference between their present and future earnings for up to six years.

Another aspect of the summary description of *Mendocino Coast* conditions which should be noted is that they provide for interest arbitration should the parties be unable to negotiate an implementing agreement. In addition, substantive benefits accorded by ICC order must be provided, upon application, to all employees from the time they are first adversely affected whether or not an implementing agreement has been reached. Section 4, *Mendocino Coast*. Thus, employees adversely affected by the transaction are generously protected against earnings losses while negotiations are in progress.

A reading of *Mendocino Coast* and the other cases setting forth LPP's[3] make it clear that, in designing a system to accommodate merger, abandonment, lease or trackage rights transactions in the railroad industry, Congress

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[3]The ICC has developed a single set of standard labor protection provisions which it has modified slightly to fit the circumstances of particular types of transactions. For mergers and consolidations, the

(Continued on next page)

and the ICC recognized that railroad employees could be adversely affected by these transactions. The adverse effects could take the form of dismissals, displacements to lower-paying jobs, forced relocations, merged seniority lists, and other changes in current working conditions. In order to eliminate or minimize these adverse effects, LPP's are required to be imposed so that individual employees have earnings protection and so that carriers are obliged to negotiate a so-called implementing agreement with the affected employees' labor organization(s) in order to deal with the changes inherent in implementing the transaction.

As evidence of the ICC's interest in expediting these matters, carriers in lease transactions need only provide a twenty day notice before implementing the transaction. Furthermore, the transaction may be implemented *before* the carrier and its union(s) reach an implementing agreement. In order to avoid delays, the ICC mandates interest arbitration at the request of either party if agreement is not reached within the twenty day notice period. A tight time schedule assures an expedited resolution. *Mendocino Coast*, §4(a)-(c).

These specific dispute resolution procedures stand in stark contrast to the RLA where major disputes are subject

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(Continued)
applicable protection provisions are those adopted in *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, *aff'd. sub nom., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979); for abandonments, the provisions are those adopted in *Oregon Short Line R.R.—Abandonment—Goshen*, 360 I.C.C. 91 (1979); for trackage rights transactions, they are those adopted in *Norfolk & Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), *modified sub nom., Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980), *aff'd. sub nom., RLEA v. United States*, 675 F.2d 1248 (D.C. Cir. 1982); and for leases, they are the *Mendocino Coast* conditions cited in the text.

to an intentionally drawn-out process without mandatory interest arbitration; *see, Brotherhood of Railway and Steamship Clerks v. Florida East Coast Railway*, 384 U.S. 238, 246 (1966), and where minor disputes can also take years to resolve without any vehicle for amending the labor agreement to account for changed circumstances.

B. The Court of Appeals' Decision Concerning Major and Minor Disputes Will Undermine National Transportation Policy

National transportation policy favors the type of transaction involved here. Under the supervision of the ICC and in accordance with the intent of Congress, railroads are engaged in the process of restructuring and adjusting the nation's rail transportation system. The purpose of this restructuring is to permit railroads to adapt to a deregulated economic environment in which they must compete with other forms of transportation.

This restructuring comports with the Congressional intent articulated by Congress in the Staggers Rail Act of 1980 ("Staggers Act") 94 Stat. 1895. In §3 of the Staggers Act, Congress explains that:

> The purpose of this Act is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States. In order to achieve this purpose, it is hereby declared that the goals of this Act are—
>
> (1) to assist the railroads of the Nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense;
>
> (2) to reform Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system;

(3) to assist the rail system to remain viable in the private sector of the economy;

(4) to provide a regulatory process that balances the needs of carriers, shippers, and the public; and

(5) to assist in the rehabilitation and financing of the rail system.

To accomplish these goals, Congress made two important changes. First, Congress provided methods allowing the ICC to decide small transactions more quickly than under present law and second, Congress reduced the number of factors the ICC must consider in ruling on transactions less sweeping than mergers.

In enacting §10505 of the ICA, Congress still recognized the importance of protecting the interests of labor and required that LPP's be applied in an exempted transaction. As discussed above, such LPP's provide substantial benefits and bargaining rights to labor while balancing the need for prompt implementation of the transaction. It is clear that ICC-imposed labor protection provisions have been viewed as the *quid pro quo* for implementing an ICC exempted or approved transaction. Labor gets the benefits provided and, in return, the carrier is permitted to implement the transaction without regard to the current working agreement or the RLA.

To the extent that the Court of Appeals leaves open the possibility that the dispute in the present transaction could be viewed as major, such a result undermines the national transportation policy. As the Eighth Circuit stated in *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry. Co.*, 314 F.2d 424 (8th Cir.) *cert. denied*, 375 U.S. 819 (1963):

> [T]he ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist.... Under the Railway Labor Act in a major dispute employees cannot be compelled to accept or arbitrate new working rules or conditions.... Thus, under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate.... [I]f it [the RLA] applied, [it] would threaten to prevent many consolidations.

It is not difficult to see what the BLE and other labor organizations seek by attempting to invoke the dispute resolution procedures of the RLA. They do not seek protection from, and the ability to bargain over, changes in the terms of employment caused by the exempted transaction. *Mendocino Coast* grants them those rights. What, in fact, they seek is the right to exercise the power of veto over implementation of an ICC-approved or exempted lease transaction, *i.e.*, they seek a veto over the railroad industry's ability to adapt to today's economic and regulatory environment. This result is clearly in conflict with the intent of Congress.

C. This Court's Guidance is Necessary to Resolve the Uncertainty in this Area

In failing to find that the Unit Coal Train controversy was subject to resolution under *Mendocino Coast*, the Court of Appeals has permitted the RLA's drawn out resolution process to contravene the Congressional doctrine of allowing and encouraging the prompt implementation of transactions which promote transportation policy. Without the proper guidance from this Court, this policy is in serious jeopardy.

There are presently pending numerous cases which have as their focus this question. Other litigation which raises questions of the relationship of the ICA and the RLA are the following: *Missouri Pac. R.R. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *pet. for cert. filed* 54 U.S.L.W. 3463 (U.S. Dec. 19, 1985) (No. 85-1054); *RLEA v. Butte, Anaconda and Pac. R.R.*, No. CV-85-73-BU (D. Mont.), *pdg. on appeal* No. 85-3875 (9th Cir.) (preliminary injunction granted plaintiff claiming applicability of RLA to ICC-approved sale and lease); *RLEA v. Staten Island Railroad Corp.*, No. 85-7483 (2d Cir., May 22, 1986) (dismissal of suit to compel carrier to bargain under RLA over ICC-approved sale transaction); *UTU v. Maine Central R.R.*, No. 85-0184-P (D. Me., filed June 17, 1985) (suit to compel carrier to bargain under RLA over ICC-approved lease transaction); *UTU v. Norfolk and Western Ry. Co.*, No. 85-3410 (D.D.C.) (suit to enjoin arbitrated implementing agreement and to compel the carrier to bargain under the RLA over ICC-authorized lease transaction, dismissed Nov. 27, 1985).

Even these suits do not fully reflect the confusion and uncertainty over this issue of national importance. Such litigation increases the risks and costs of the reorganization of the rail system and serves to discourage reorganization, the result opposite of that intended by Congress.

D. The Court of Appeals' Determination on the Issue of the Existence of Major and Minor Disputes Resulted in a Collateral Attack on an ICC Order

The Court of Appeals' finding that the Unit Coal Train controversy was a minor dispute and the remaining disputes were major resulted in a collateral attack on an Order of the ICC. The Court of Appeals recognized that such was the case in regard to its "major" dispute finding

but failed to recognize this in regard to its finding that the Unit Coal Train controversy was a "minor" dispute.

Although styled as an action under the RLA, the Complaint requested the District Court to enter injunctive relief which, if granted, would necessarily have reversed or modified an ICC Order. The BLE asked the District Court to require B&M to resume operations on track leased to NES and to reinstate employment positions abolished as a result of the transaction. Necessarily, the BLE also asked the District Court to require NES to abolish jobs created to fulfill obligations under the lease, to cancel or freeze obligations entered into for capital acquisitions and to halt business development activities which were promising and which could be irreparably harmed by uncertainty over NES's right to operate on the leased track. These are all matters presented to the ICC in the course of the exemption proceeding. The ICC's Decision anticipated and authorized these activities.

A District Court's jurisdiction is limited to *enforcing* ICC orders. 28 U.S.C. §1136(a). Attempts to change ICC orders must be addressed either to a Court of Appeals on a petition for review under 28 U.S.C. §2344, or to the ICC under its primary jurisdiction to resolve matters of national transportation policy. *ICC v. Atlantic Coast Line Railroad*, 383 U.S. 576, 579 (1966).

The primary jurisdiction doctrine "requires initial submission to the [Interstate Commerce] Commission of questions that raise issues of transportation policy which ought to be considered by the [Interstate Commerce] Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the Interstate Commerce] Act." *ICC v. Atlantic Coast Line Railroad*, 383 U.S. at 579, *quoting United States v. Western*

Pacific Railroad, 352 U.S. 59, 65 (1956). The ICC's primary jurisdiction embraces initial consideration of matters of national transportation policy and subsequent determinations of the scope and meaning of its orders. *Southern Railway Co. v. United States*, 412 F.Supp. 1122, 1151 (D.C.D.C. 1976) (three judge panel).

The BLE argued below that its action under the RLA is not a collateral attack on an ICC Order because relief could be allegedly fashioned in the present situation by allowing the lease transaction to remain consummated, while requiring the carrier to continue to pay affected employees as though the transaction had not been implemented.

The Court of Appeals properly held that any injunction preserving the *status quo* would overturn the ICC Order and, therefore, would be an impermissible collateral attack on an ICC Order. The reasoning supporting this result is unassailable. First, the District Court's authority to enforce obligations under Section 6 of the RLA is limited to issuing injunctions to preserve the *status quo*. Prior to July 15, 1985, the *status quo* was that certain employees worked certain routes in return for specified compensation. An injunction which requires payment of the specified compensation without necessity of working preserves only one half of the *status quo*. Either the Court may preserve the *status quo* or it may not; no court has authorized preserving selected portions of the *status quo*.

Second, an injunction ordering that employees be compensated as though B&M continued to operate trains on leased track runs head-on into the ICC-imposed requirements under *Mendocino Coast* that employees dismissed or displaced as a result of the lease be paid allowances preserving their earnings as measured during

the previous year. If the injunction purports to supercede *Mendocino Coast*, then it is in direct conflict with the ICC Decision; if the injunction does not purport to supercede *Mendocino Coast*, then it may interfere with the dismissal and displacement allowances B&M must make under *Mendocino Coast* to adversely affected employees.

Third, an injunction ordering that employees be compensated as though B&M continued to operate trains on leased track may be viewed as interfering with the purpose, and intended benefits, of the ICC Decision. B&M and NES bargained at arm's length over the lease, and each side anticipated that it would realize various benefits. An injunction which would deprive B&M of the benefit of the ICC Order is surely the functional equivalent of a judicial order "to enjoin, set aside [or] suspend (in whole or in part) . . . final orders of the Interstate Commerce Commission." 28 U.S.C. §2342.

Fourth, the BLE's position is that B&M must negotiate with it before it is permitted to abolish positions, change routes, or otherwise alter working conditions resulting from implementation of the ICC exempted lease. The BLE requested issuance of a *status quo* injunction pursuant to Section 6 of the RLA which was designed to prevent changes in working conditions until the negotiations procedure is exhausted. Thus, any injunction which might be issued pursuant to Section 6 would be in direct conflict with that portion of *Mendocino Coast* which expressly authorizes the transaction to be implemented *before* negotiations with the union have resulted in an agreement.

In short, the relief which the BLE sought would have undone the lease which had already been implemented pursuant to authorization of the ICC. Even injunctive

relief which stops short of requiring B&M to violate its lease represents a conflict with, or modification of, the ICC Decision. Clearly, then, this was an action "to enjoin, set aside, [or] suspend (in whole or in part)" a decision of the ICC and should have been brought in the Court of Appeals.

The Court of Appeals for the Second Circuit reached a similar result in *Railway Labor Executives' Association v. Staten Island Railroad Corporation*, No. 85-7483 (2nd Cir., May 22, 1986). *Staten Island* involved an action by the Railway Labor Executives' Association ("RLEA") to obtain a *status quo* injunction under the RLA. Staten Island planned to abandon its entire line and trackage rights in accordance with the applicable provisions of the ICA. The ICC conditioned its approval of Staten Island's abandonment upon compliance with *Oregon Short Line* protection provisions. Prior to actual abandonment, New York Susquehanna and Western Railway ("NYS&W") filed an offer to purchase Staten Island and NYS&W negotiated a deal which required, *inter alia*, that the abandonment petition be dismissed along with the employee protection provisions imposed, that the employee protection requested by the RLEA be denied, and that the parties be exempt from Section 6 notices under the RLA. The ICC approved the transaction, dismissed Staten Island's abandonment application and did not impose labor protection provisions. In affirming the dismissal by the District Court, the Second Circuit held that the RLEA's action was an impermissible collateral attack on an ICC Order as "[u]nder no circumstances could [the relief sought] be granted without recision or modification of the ICC's order." Slip Opinion at 11.

Having correctly decided that any attempt to impose a *status quo* injunction under the "major" dispute provisions of the RLA would be a collateral attack on an ICC Order, the Court of Appeals erroneously held that the Unit Coal Train controversy was a "minor" dispute subject to resolution under the RLA. Such a finding, however, is itself a collateral attack upon an ICC Order. The jurisdiction of the ICC over leases is exclusive. 49 U.S.C. §11341. The ICC Order exempting the lease transaction provided a dispute resolution mechanism to fulfill the objective of Congress that transactions such as this be implemented in a timely manner while still protecting the interests of labor. Since the ICC's jurisdiction over the lease is exclusive, the dispute resolution mechanism which is provided must also be the exclusive remedy available to the BLE.

In short, any attempt to resort to the dispute resolution mechanisms of the RLA, either a *status quo* injunction under Section 6 or arbitration before the National Railroad Adjustment Board, is an improper attempt to invade the exclusive jurisdiction of the ICC and amounts to an impermissible collateral attack on an order of the ICC.

II. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THIS COURT'S DECISION IN DETROIT AND TOLEDO SHORE LINE RAILROAD V. UNITED TRANSPORTATION UNION

Assuming that it was appropriate to analyze this action in terms of the RLA's "major" and "minor" dispute resolution mechanisms, the Court of Appeals erred below in finding that a major dispute existed with regard to the

EDCO/COED route and the switching assignment at Concord. Due to the implementation of the ICC exempted transaction, BLE members are no longer employed on the New Hampshire lines portion of the EDCO/COED route, these duties being performed by NES employees. This change resulted in a reduction in the mileage of the EDCO/COED assignment for BLE members and a corresponding reduction in pay. Additionally, the switcher assignment at Concord was abolished and the duties are now performed by NES employees.

The Court of Appeals held that these changes raised a "major" dispute under the RLA because they constituted a unilateral action by the railroad not based on the existing agreement or past practice. Petitioner's Appendix at 7a-9a. This holding, however, is inconsistent with *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142 (1969). In *Detroit & Toledo Shore Line*, this Court recognized that the actual and objective working conditions include instances of custom and practice which employees and employers have acknowledged through past performance to be part of the actual working conditions. *Id.* at 153-54.

The Court of Appeals, while recognizing this proposition, held that the instances of past practice cited by B&M could not be used to establish that this dispute is a minor dispute because the union had objected to these transactions. B&M had leased track in the past which resulted in adverse impacts to B&M employees. Where disputes had arisen over this practice in the past, the parties had always handled them in accordance with standard grievance procedures leading to arbitration before the National Railroad Adjustment Board or a mutually selected public law board. Thus, the union's prior conduct of never treating these

disputes as "major" disputes establishes that the terms and conditions of employment were such that any dispute relating to adverse impacts caused by a lease of track were to be handled as "minor" disputes. In addition, the BLE's filing and processing of grievances (time claims) on the leased lines is further cumulative evidence that any issue should be treated as a "minor" dispute. Thus, the objective working conditions between the parties include the condition that all disputes arising out of a lease of trackage will be handled as "minor" disputes.

The Court of Appeals, however, misapplied *Detroit & Toledo Shore Line* and held that, because the BLE had failed to accept and consent to each prior lease, these precedents could not be used to establish the actual, objective working conditions. The Court of Appeals failed to recognize that the crucial acquiescence was not to the lease itself, but to the manner in which any disputes arising from the lease would be handled. All disputes in the past arising from lease transactions had been handled as minor disputes and, therefore, the treatment of disputes caused by the lease of trackage as a minor dispute has become part of the actual objective working conditions. The Court of Appeals decision on this issue is clearly erroneous and the guidance of this Court is necessary to clarify this Court's decision to *Detroit & Toledo Shore Line.*

CONCLUSION

For all of the foregoing reasons, Cross-Petitioner, Boston and Maine Corporation, respectfully requests that this Court grant the Cross-Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit were served this 30th day of July, 1986, on counsel of record by depositing the same in the United States Mail, First Class, postage prepaid, addressed as follows:

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.....
Stephen M. Olson

APPENDIX A

INTERSTATE COMMERCE COMMISSION DECISION

FINANCE DOCKET NO. 30618

NEW ENGLAND SOUTHERN RAILROAD CO., INC.—LEASE AND OPERATION EXEMPTION—BOSTON AND MAINE CORPORATION

Decided: April 26, 1985

On January 29, 1985, Boston and Maine Corporation (B&M) and New England Southern Railroad Co., Inc. (NES), filed a joint petition for exemption, pursuant to 49 U.S.C. 10505, from certain provisions of 49 U.S.C. Subtitle IV, including 49 U.S.C. 10901, 10903, 11342, and 11343. The transaction involves the lease to NES by B&M of a portion of its line of railroad referred to as the "New Hampshire Lines" and the operation of those lines by NES.

B&M's New Hampshire main line runs between Boston, MA and Hartford, VT, and is approximately 130 miles long. B&M will lease to NES: (1) a portion of the main line between milepost B56.00, near Manchester, NH, and milepost B80.68, near Penacook, NH; (2) a portion of the Concord-Lincoln line beginning at the switch with the New Hampshire main line in Concord at milepost B73.72 and extending to milepost 1.17; (3) a 0.49-mile segment of the former Claremont and Concord Railroad (CC) line from the switch in Concord at valuation station 1839+42.15 to valuation station 41+98; and (4) one track in the B&M yard at Manchester for interchange purposes. The total mileage involved is approximately 27 miles. NES

will operate over these segments of line and provide service, for its own account, to the approximately 27 customers on this trackage. B&M will continue to provide service to the Public Service of New Hampshire plant at Bow, NH and, in addition, will retain the right to operate over the line to provide service to certain new customers and to provide service in the event that the service provided by NES is inadequate. The new customers for which BM may provide service are : (1) those that anticipate traffic of at least 750 carloads per year; and (2) those that anticipate at least 15 carloads on each movement and for which BM and NES cannot agree to joint routes and rates applicable to that traffic.

NES will be responsible for maintenance of the segment of line from milepost B71.37 at Bow Junction north to Penacook, as well as the segment of the Concord-Lincoln line and the segment of the former CC line, all of which is referred to as the "North End". B&M will maintain the remainder, which is referred to as the "South End". NES may make alterations or additions to the line, with B&M's consent, and these alterations and additions become the property of B&M and may not be removed on termination of the lease.

For those customers served by B&M on the North End, it will pay such portion of the maintenance expenses on that segment of the leased line as the annual gross ton miles handled by it on the North End bear to the total annual gross ton miles on that section of the line. Further, NES will not be responsible for any portion of the cost of improvements or facilities required to serve B&M customers, regardless of where they are located on the leased line.

The South End will be operated under the rules and regulations of B&M, and any NES crews operating over

the South End must be qualified under B&M rules. The North End must be operated under NES rules and regulations; however, if B&M exercises its right to operate that segment of the line, the North End must be operated under the rules and regulations of B&M.

NES will maintain liability insurance, as approved by B&M, and will pay its portion of income taxes as are related to its income from operation of the line. The term of the lease will be for 10 years; however, either party may terminate the lease upon three-months' notice. Further, the lease will terminate if, after notice of a default by NES, NES fails to cure such default.

NES traffic originating or terminating on the line will be interchanged at Manchester. NES will receive a fixed division equal to 23 percent of the B&M revenue for each carload for the first 2,300 carloads in a calender year. For those cars in excess of 2,300, NES will receive a fixed division equal to 15 percent of the B&M revenue for each period.

On March 5, 1985, the United Transportation Union General Committee of Adjustment, Boston and Maine Corporation (UTU) filed a petition requesting denial of the exemption. It also requested that the proceeding be assigned for oral hearing. However, the issues presented can be resolved on the present record. The request for oral hearing is denied.

UTU states that B&M did not negotiate with it as to any of the terms and conditions of the proposal that relate to their collective bargaining agreements. It argues that the proposal will cause irreparable harm to the rail employees that it represents and that the labor protective conditions usually imposed in such instances will not satisfy the

requirements of rail labor on the B&M property represented by UTU. UTU also argues that those conditions would negate the terms and conditions of the collective bargaining agreements and are contrary to the legal seniority rights that it has achieved. Thus, the union contends, any Commission action in this matter is contrary to any, therefore, barred by 45 U.S.C. Chapter 8, Sec. 151 et. seq.

We are required by 49 U.S.C. 11347 to impose protective conditions for employees who are affected by this type of proposal, and we have developed appropriate conditions to provide the required level of protection. UTU has not shown how these conditions negate the terms of the collective bargaining agreements or are contrary to seniority rights. The conditions provide the basic level of protection and do not supercede the more extensive protection that may be agreed on through collective bargaining. Finally, the provisions of 45 U.S.C. Chapter 8, Sec. 151 et. seq., do not contain language precluding this Commission from acting on rail matters coming within our exclusive and plenary jurisdiction.

The lease and operation of B&M trackage by NES constitutes a transaction under 49 U.S.C. 11343(a)(2). However, petitioners suggest, and UTU maintains, that the transaction may also fall within the purview of other statutory provisions. We do not agree. Although the effect of the transaction is that NES will operate another line in addition to its present system, the transaction is not one contemplated under 49 U.S.C. 10901(a)(4). That section governs the unilateral action of a single rail carrier. Here, the transaction involves the joint action of two rail carriers and is properly considered under 49 U.S.C. 11343(a)(2).

Further, the action of B&M does not constitute a discontinuance of service within the meaning of 49 U.S.C.

10903. The carrier will not completely cease service over the line, since it will continue to serve on particular facility. Also, it will continue to hold itself out to the public as a rail carrier and will perform service for certain customers meeting specified criteria.

Finally, the transaction does not constitute pooling under 49 U.S.C. 11342. Since pooling contemplates a curtailment of competition, there must be an existing competitive relationship between the carriers for the transaction to be considered pooling. NES does not presently operate over the line, and there is no competition between the carriers.

Further, even after NES begins operation over the North End, there will not be a pooling arrangement with respect to new shippers locating on that segment. Although both carriers will be able to operate over the same segment of line, they will not be competing for the traffic of the new shippers, because only one carrier will have the right to serve any particular shipper.

Under 49 U.S.C. 10505, we must exempt a transaction if we find that (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the matter is of limited scope, or (b) regulation is not necessary to protect shippers from an abuse of market power.

UTU argues that regulation of the proposed transaction is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, since implementation of the proposal will pose a danger of abuse of market power, will adversely affect the quality of rail service on the line, and will affect the competitive alternatives presently available to shippers on the line.

UTU states that, in 1984, B&M removed most of the rail in the Concord Yard. It also broadly asserts that B&M has seriously downgraded the facilities within the proposed leased lines. It has not shown, however, or even alleged, that B&M has caused a deterioration in its service by any of these purported actions.

UTU also contends that the parties have not shown that NES can achieve the quality of service presently provided by B&M or that it will aggressively seek out new sources of traffic and encourage new shippers to locate on the lines. The union, however, has not furnished evidence of previous service complaints against NES. Further, the proposal protects the quality of service by providing that B&M will reenter and operate the lines if NES cannot maintain an acceptable level of service. Finally, there is no statutory requirement that NES show that it will increase the level of operations over the B&M line.

Consequently, we conclude that our detailed scrutiny of the transactions is not necessary to carry out the rail transportation policy. There is nothing to show that actions preceding the proposal have resulted in a deterioration of service, or that implementation of the proposal will have an adverse effect on that level of service. Granting the exemption will minimize regulation, expedite decisions where regulation is not necessary, and reduce regulatory barriers to entry. Further, there will not be any abuse of market power, since there will not be any change in the number of competitive alternatives available to shippers or any change in the quality of service. There will be only a substitution of one carrier for another, with the new carrier operating under the standards of the previous carrier. Finally, the proposal is of limited scope, involving only 27

miles of line, 27 customers, and 2,000 carloads of traffic per year.

The Railway Labor Executives' Association and the Brotherhood of Locomotive Engineers request the imposition of labor protective conditions. Under 49 U.S.C. 10505(g), we may not relieve a carrier of its obligation to protect employees. In transactions involving leases and contract to operate, the Commission has determined that those employee protective conditions in *Mendocino Coast Ry., Inc.—Lease and Operate*, 354 I.C.C. 732 (1978), as modified at 360 I.C.C. 653 (1980), satisfy the statutory requirements under 49 U.S.C. 11347.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The request for oral hearing is denied.

2. We exempt, from the requirements of 49 U.S.C. 11343(a)(2), the lease and contract to operate by New England Southern Railroad Co., Inc., a line of railroad of the Boston and Maine Corporation running between Manchester and Penacook, NH, and also certain branch and yard trackage, appurtenant thereto and described here, subject to the rail employee protective conditions in *Mendocino Coast Ry., Inc.—Lease and Operate*, 354 I.C.C. 732 (1978), as modified at 360 I.C.C. 653 (1980).

3. Notice will be published in the *Federal Register*.

4. This decision is effective on June 17, 1985.

5. Petitions to stay must be filed by May 20, 1985, and petitions for reconsideration must be filed by June 5, 1985.

By the Commission, Chairman Taylor, Vice Chairman Gradison, Commissioners Sterrett, Andre, Simmons, Lamboley, and Strenio. Commissioner Lamboley concurred with a separate expression. Commissioner Simmons did not participate.

. . . . . .

(SEAL) James H. Bayne
Secretary

COMMISSIONER LAMBOLEY, concurring:

I agree with the result in this case. In my view, however, the decision should recognize that after operation this lease transaction is in fact a pooling arrangement under 49 U.S.C. §11342, but which may be properly exempted.

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-160

In the Supreme Court of the United States

October Term, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

vs.

BOSTON & MAINE CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the First Circuit

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No. 86-160

In the Supreme Court of the United States

October Term, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

vs.

BOSTON & MAINE CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the First Circuit

STATEMENT OF THE CASE

This case arises out of a dispute resulting from unilateral actions taken by the Boston & Maine Corporation ("B&M"), a carrier by rail, subsequent to its lease to the New England Southern Railroad ("NES") of certain of B&M's New Hampshire lines running from Manchester, New Hampshire to Penacook, New Hampshire, a distance of approximately 27 miles (2a).[1] B&M engaged in this unilateral action subsequent to an order of the Interstate Commerce Commission ("ICC") which exempted the lease from the regulatory requirements of the Interstate Commerce Act (*Id.*). First, B&M unilaterally abolished a yard

1. References to the suffix "a" are to the appendix attached to BLE's petition in No. 85-2153 and references to "JA" are to the Joint Appendix in the court of appeals.

switching assignment at Concord, New Hampshire, and informed BLE that NES employees would thereafter perform the switching (3a). Second, B&M unilaterally shortened assignments known as "EDCO/COED" from East Deerfield, Massachusetts to Concord so that B&M employees represented by BLE would work only as far as Manchester, New Hampshire, rather than Concord, and would therefore suffer a corresponding reduction in pay (3a). Third, B&M unilaterally abrogated an agreement dated January 11, 1968, which provided it with certain efficiencies in the operation of unit coal trains in exchange for enhanced rates of pay and other favorable conditions for locomotive engineers (6a and JA at 24, 25 and 67).

B&M's abrogation of the unit coal train agreement involved a three step process. Initially, B&M unilaterally abolished the regularly scheduled assignments on the unit coal trains which previously ran 204 miles from Mechanicville, New York to Bow, New Hampshire. At Bow, the coal cars had been detached at the Public Service of New Hampshire electric generating plant with the engine and caboose then proceeding five miles northward to Concord where the crew would be rested (JA at 15 and 18). B&M replaced the regularly scheduled assignments with new assignments through its spare board at Mechanicville, New York (JA at 20). These assignments were identical to the prior assignments in that they still ran over the 204 mile distance from Mechanicville, New York to Bow. Now, however, instead of proceeding northward five miles to Concord following the delivery of the coal cars at Bow, the engine and caboose are taken southward one mile to the "Perini" track, where the crew is then driven approximately ten or eleven miles to Manchester, New

Hampshire for rest (JA 18-20). As the final step in its abrogation of the unit coal train agreement, B&M informed BLE that it would no longer comply with the agreement on the ground that the introductory words of the agreement referred to "the operation of Special Unit Coal Trains between Mechanicville, New York and Concord, New Hampshire." (JA at 19; 6a). Since locomotive engineers no longer proceeded to Concord after delivering the coal cars at Bow due to the unilateral operational changes B&M had made, B&M contended that it had no obligation to adhere to the terms of the unit coal train agreement (*Id.*). However, prior to this change, when the engine and caboose did not proceed to Concord after delivering the coal cars at Bow, B&M consistently paid engineers in accordance with the unit coal train agreement (JA at 73 and 111-12). The net result of B&M's present action was that through its own unilateral acts, B&M escaped its obligations under the unit coal train agreement. Although delivering the coal cars from Mechanicville to Bow in the same manner as before, B&M paid its locomotive engineers only half of what they were previously paid (JA at 72).

When conferences failed to resolve the dispute, BLE filed suit claiming that B&M's actions constituted a major dispute in violation of B&M's bargaining obligations under the Railway Labor Act ("RLA"), 45 U.S.C. §151, *et seq.* The first count of the complaint challenged B&M's actions with respect to the unit coal train assignments, and the second count challenged B&M's abolishment of the yard switching job at Concord and B&M's shortening of the "EDCO/COED" assignments (JA at 3-11).

Accepting B&M's contention that the unit coal train agreement arguably did not apply to its present operations due to the introductory words of reference in the agree-

ment, the district court found that it lacked jurisdiction over the complaint because it constituted a minor dispute within the exclusive jurisdiction of the National Railroad Adjustment Board (19a). In dismissing the entire case for want of subject matter jurisdiction, the district court did not consider the second count of BLE's complaint concerning the yard switching job at Concord and the "EDCO/COED" assignment (20a).

Affirming, the court of appeals adopted a different approach. As to the second count which had been ignored by the trial court, the court below held that B&M's unilateral changes in the Concord switching job and the EDCO/COED assignments constituted a major dispute in violation of section 6 of the Act, 45 U.S.C. §156 (8-9a). Despite this finding, the court held that the district court nonetheless lacked subject matter jurisdiction. According to the court of appeals, B&M was exempted from the RLA by reason of 49 U.S.C. §11341(a), and BLE's complaint constituted a collateral attack upon the ICC's order which the district court was without authority to entertain (14a).

As to the first count concerning the unit coal train assignment, the court of appeals totally disregarded its analysis in count two relative to a major dispute having arisen from B&M's unilateral actions. Instead, the court approached the subject in a manner similar to the rationale followed by the district court, holding count one raised a minor dispute over which the court lacked jurisdiction (6-7a).

SUMMARY OF ARGUMENT

The first two questions presented by the cross-petition, which seek review as to whether the first count of the complaint concerning the unit coal train constitutes a collateral attack on the ICC order involving the lease of the B&M's New Hampshire lines to NES, are inappropriate for review. These issues are irrelevant in that the unit coal train claim can be resolved without any reference to any trackage subject to the lease exempted by the ICC order. In short, the lease has nothing to do with the operation of the unit coal train, and the first count accordingly is unaffected by the ICC order. Moreover, these questions raise new issues which have not been decided by either the district court or the court of appeals. Certiorari should not be granted on issues that have not been passed upon or considered by the courts below. *See Tacon v. Arizona,* 410 U.S. 351 (1973); *Adickes v. S. H. Kress Co.,* 398 U.S. 144, at 147 n. 2 (1970); *Ellis v. Brotherhood of Railway Clerks,* 466 U.S. 435, at 443 n. 6 (1984).

The third question presented in the cross-petition requests review of whether the few, sporadic instances of dispute handling over lease transactions in the past became an actual, objective working condition which bound BLE to treat all future disputes as minor ones. This issue is not worthy of review by this Court. In any event, this aspect of the petition should be denied, because B&M did not raise the issue in the courts below. *See Tacon v. Arizona,* 410 U.S. 351 (1973).

ARGUMENT

THE ISSUES RAISED BY THE CROSS-PETITION ARE NOT WORTHY OF CONSIDERATION BY THIS COURT AND WERE NEVER ADDRESSED BY THE COURTS BELOW.

BLE agrees with B&M that there exists "confusion and uncertainty over this issue of national importance" concerning the relationship of the [Interstate Commerce Act (ICA), 49 U.S.C. §10101, *et seq.*] and the RLA." (B&M Cross-Petition at p. 13). As B&M correctly points out, there are "presently pending numerous cases which have as their focus this question" concerning the relationship of the ICA and the RLA and "this Court's guidance is necessary to resolve the uncertainty in this area" (*Id.* at 12-13).

While the first and second questions presented in BLE's petition for certiorari (No. 85-2153) would permit this Court to clarify this "confusion and uncertainty" in a direct manner,[2] the first and second questions presented

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2. The first two questions of BLE's petition relate to the decision of the court of appeals on the second count of BLE's complaint and pose the following inquiries:

1. Does the exemption granted a railroad by the Interstate Commerce Commission under 49 U.S.C. §10505 in a lease transaction automatically relieve the carrier from its bargaining obligations under the Railway Labor Act (45 U.S.C. §§151, *et seq.*) and also its obligations to preserve the rules, working conditions and collective bargaining rights of its employees as provided under 49 U.S.C. §11347, thereby depriving its employees of any voice in determining which persons may operate the trains over the leased trackage?

2. Did the court of appeals err in concluding that an action to enjoin what it found to be a clear violation of the Railway Labor Act through unilateral changes in major working conditions by the rail carrier involved

(Continued on following page)

in B&M's cross-petition would not, because B&M's questions raise irrelevant issues.

In regard to the second count of BLE's complaint which is the subject of the first and second questions presented in BLE's petition for certiorari (*see infra*, fn. 2), the adverse employment action at issue took place exclusively within the trackage subject to the lease involved in the ICC order. Specifically, the yard switching job at Concord, New Hampshire which B&M abolished fell within the leased trackage between Manchester and Penacook. Likewise, the shortening of the "EDCO/COED" assignment involved only the trackage from Manchester to Concord, New Hampshire, which also fell within the leased trackage.

In contrast, in regard to the first count of BLE's complaint which is the subject of the first and second questions presented in B&M's cross-petition for certiorari, the adverse employment action at issue did not take place exclusively within the trackage involved in the lease. Specifically, the job assignments at issue in the first count concerned the delivery of unit coal cars from Mechanicville, New York to the Public Service of New Hampshire electric generating plant at Bow, New Hampshire. This entire 204 mile distance was totally unaffected by the lease.[3] In short, BLE's questions deal squarely with the problem, B&M's do not.

Footnote continued—

> in a transaction exempted by the Interstate Commerce Commission is a collateral attack on the Commission's order and, therefore, not within the jurisdiction of the courts?

3. Though the ten mile distance of the unit coal train assignment from Manchester, New Hampshire to Bow, New Hampshire fell within the area from Manchester to Penacook, the lease expressly provided that "B&M shall continue to have the exclusive right to serve for its own account the electric generating plant of Public Service of New Hampshire." (JA at 40).

B&M argues, however, that the unit coal train assignments are affected by the lease, because the engine and caboose no longer travel northward five miles to Concord after delivery of the unit coal cars at Bow, inasmuch as that portion of the trackage is subject to the lease. As a result, B&M argues that the ICC order involving the lease permitted it to not only unilaterally eliminate the five-mile route of the engine and caboose from Bow to Concord, but also permitted B&M to take adverse employment action on the 204 miles of trackage totally unaffected by the lease by unilaterally cancelling the regularly scheduled assignments,[4] instituting newer longer assignments,[5] changing the engineers' resting location,[6] and cutting pay into half for engineers on the unit coal train assignment.[7] Clearly, these adverse employment actions cannot be deemed "necessary to let [B&M] carry out the [lease] transaction," nor can the ICC decision be interpreted

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4. In contrast to the prior regularly scheduled assignments, the unit coal trains are now serviced through rotating assignments at B&M's spare board at Mechanicville (JA at 20).

5. Before these new changes, the unit coal train assignment constituted 209 miles. (204 miles [Mechanicville to Bow] plus 5 miles [Bow to Concord] = 209 miles). Under the new changes, the trip from Mechanicville is now 215 miles, six miles greater than before. (204 miles [Mechanicville to Bow] plus 1 mile [Bow to the Perini track] plus 10 miles [Perini track to Manchester] = 215 miles). The trip back to Mechanicville is now 213 miles, four miles greater than before. (10 miles [Manchester to the Perini] plus 203 miles [Perini track to Mechanicville] = 213 miles).

6. Before these new changes, engineers rested at the Capitol Motor Inn (formerly Howard Johnson's) at Concord, New Hampshire (JA at 18). They now rest at the Queen City Motor Inn at Manchester, New Hampshire (JA at 21).

7. Though engineers still deliver the unit coal cars to the electric generating plant of Public Service of New Hampshire along the same 204 mile route from Mechanicville to Bow, and though they now work longer assignments than before (*see supra*, fn. 5), they no longer enjoy the enhanced rates of pay provided for in the unit coal train agreement (JA at 72).

as anticipating or authorizing these actions. 49 U.S.C. §11341(a).

In any event, resolution of the first count of BLE's complaint can be made without any reference to the ICC order. BLE raises three arguments to support its contention that B&M's action with respect to the unit coal train creates a major dispute. First, BLE contends that B&M's consistent adherence to the unit coal train agreement over the years, even when the engine and caboose did not proceed to Concord after the delivery of the coal cars at Bow, created an actual, objective working condition which B&M was prohibited from unilaterally changing. *Detroit & Toledo Shore Line R.R. v. United Transportation Union,* 396 U.S. 142 (1969). If this argument is accepted, B&M's first and second questions presented in its cross-petition are not germane, because resolution of the dispute is not contingent upon analysis of any of the trackage subject to the lease involved in the ICC order.

Similarly, B&M's questions also become irrelevant if BLE's second argument is accepted. BLE's second argument is that despite the introductory words of reference in the agreement, the unit coal train agreement applies to B&M's present operations because the clear intent of the agreement was to provide for the delivery of coal cars to Bow and, therefore, the agreement's applicability was not affected by the route of the engine and caboose after the delivery of the coal cars. Thus, if the agreement is found to be applicable under B&M's present operations, the effect of the ICC order is irrelevant.

BLE's third argument is that the unit coal train controversy is a major dispute because B&M lacked authority

to unilaterally implement the changes which it contends have rendered the unit coal train agreement inapplicable. This third argument is the only one in which B&M's first and second questions may have any relevancy whatsoever. However, as mentioned previously, even if the ICC order is interpreted as granting B&M the authority to change the assignment in spite of its obligation under the RLA, the ICC order cannot be interpreted as granting B&M the authority to make unilateral changes on the 204 mile route totally unaffected by the lease involved in the ICC order.

In addition, with both courts below having found the unit coal train controversy a minor dispute, neither court ruled upon the first or second question raised in B&M's cross-petition.[8] The Court has consistently held that it will not normally consider issues that have not been addressed by the courts below. *See Tacon v. Arizona*, 410 U.S. 351 (1973); *Adickes v. S. H. Kress Co.*, 398 U.S. 144, at 147 n. 2 (1970); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, at 443 n. 6 (1984). Issues on which the court of appeals have not passed are not considered, because the Court does not have the benefit of the lower court's view. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, at 568 (1981). Since the Court will be unaided by any opinions of the courts below and the issues weigh clearly against B&M's position, B&M's cross-petition for certiorari should be denied as to the first two questions presented.

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8. In fact, B&M argued vociferously in its brief and on oral argument to the court of appeals that the dispute was a minor one and that the employees could be awarded lost wages through arbitration if B&M's reading of the bargaining agreement were incorrect. B&M cannot have it both ways, as it is now seeking in this Court.

The same reasoning is equally applicable to the third question presented in the cross-petition. As the basis for granting certiorari as to that question, B&M urges that the decision below that the second count of BLE's complaint raised a major dispute conflicts with this Court's decision in *Detroit & Toledo Shore Line R.R. v. United Transportation Union,* 396 U.S. 142 (1969), to the extent of whether an instance of past handling becomes an actual, objective working condition that binds a union to handle all future disputes in the same manner.

In *Shore Line,* this Court held that the status quo which must be maintained under the RLA "extends to those actual, objective working conditions out of which the dispute arose." *Id.* at 153. Accordingly, the Court noted that a carrier may engage in operational changes apart from the agreement, if, but only if, the carrier has made similar operational changes "for a sufficient period of time with the knowledge and *acquiescence* of the employees to become in reality a part of the actual working conditions." *Id.* at 154. (Emphasis added). In the present case, the court of appeals found that B&M's failure to demonstrate BLE's acquiescence was "fatal to B&M's argument" that the second count raised a minor dispute (8-9a).

The cross-petition for certiorari does not directly challenge the decision of the court of appeals on the score that BLE did not acquiesce in B&M's prior operational changes. Rather, B&M develops a new theory by arguing that "the treatment of disputes caused by the lease of trackage as a minor dispute has become part of the actual objective working conditions." (Cross-Petition at 20). However, B&M did not raise this argument below, and it ought not be permitted to raise this argument for the

first time before this Court.[9] As this Court said in *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977), where an issue has not been "pleaded, argued, nor briefed either in the District Court or the Court of Appeals, we will not consider it." *See also Tacon v. Arizona*, 410 U.S. 351 (1973).

Furthermore, B&M cites no authority for the proposition that the prior handling of a dispute as a minor one creates an actual, objective working condition which binds a union to handle all future disputes in the same manner. B&M cites no conflict between the courts of appeals on this issue, nor does it assert that the decision of the courts below constitutes a departure from the accepted and usual course of judicial procedures.

In addition, this Court rejected such a view in *Shore Line*. In that case, a major dispute was found in the carrier's establishment of outlying job assignments, even though the union initially submitted the matter as a minor dispute before an adjustment board and the board ruled that nothing in the agreement prohibited the carrier from establishing the assignment. 396 U.S. at 146-47, n. 8 and 9. *See also Air Cargo, Inc. v. Local Union 851, International Brotherhood of Teamsters*, 733 F.2d 241, 247, n. 5 and 6 (2d Cir. 1984) (dispute which was initially treated as a minor dispute is nonetheless a major dispute because in resolving

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9. While B&M stated in a vague fashion that "BLE's filing and processing of grievances (time claims) on the leased lines is further, cumulative evidence that this issue is a minor dispute," the thrust of B&M's argument was that B&M's actions did not constitute a unilateral change in working conditions because "B&M's actions in entering into the lease, permitting the lessee to operate trains on the leased track, and reassigning its own employees is consistent with past practice." (Brief of Defendant-Appellee Boston and Maine Corporation before court of appeals at 32-33). At no point did B&M argue that BLE's handling of prior disputes as minor disputes created any actual objective working condition which bound BLE to handle all future disputes in that same manner.

the major/minor dispute dichotomy, courts focus on substance and "do not rely on the labels parties place on their disputes or other 'contentions' or 'maneuvers' of the parties"). Accordingly, B&M has not presented any sufficient reason for this Court to grant its cross-petition for certiorari on its new theory of the case.

CONCLUSION

Based upon the above reasons and authorities, petitioner/cross-respondent Brotherhood of Locomotive Engineers respectfully requests the Court deny the cross-petition for a writ of certiorari.

Respectfully submitted,

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